

Appeal from a March 7, 1978, decision of the Oregon State Office, Bureau of Land Management declaring the Elk Association Placer Claims Nos. 1 through 22 null and void ab initio. OR MC 4938-59.

Affirmed.

1. Mining Claims: Generally--Mining Claims: Lands Subject to--Mining Claims: Withdrawn Land--Public Lands: Classification--Recreation and Public Purposes Act--Withdrawals and Reservations: Effect of--Withdrawals and Reservations: Temporary Withdrawals
Lands segregated on the public records by a proposed withdrawal posted Apr. 6, 1973, or a Recreational and Public Purposes Classification filed Nov. 13, 1956, were not available for the location of mining claims, and claims thereafter located are null and void ab initio
2. Administrative Procedure: Administrative Procedure Act--Administrative Procedure: Rule Making--Public Lands: Classification--Recreation and Public Purposes Act--Regulations: Publication--Withdrawals and Reservations: Effect of--Withdrawals and Reservations: Temporary Withdrawals

Neither a Recreation and Public Purposes Act classification nor a withdrawal is a rule or regulation within the ambit of the Secretarial policy of Apr. 27, 1971, which provides for utilization of the public participation procedures of 5 U.S.C. § 553 (1976).

3. Administrative Procedure: Administrative Procedure Act–Hearings–Mining Claims: Lands Subject to–Public Lands: Classification–Withdrawals and Reservations: Effect of–Withdrawals and Reservations: Temporary Withdrawals

Mining claims purportedly located on land not available for such location confer no property right upon the locator, and may be declared null and void ab initio without a hearing under 5 U.S.C. § 554 et seq. (1976).

4. Mining Claims: Lands Subject to–Withdrawals and Reservations: Effect of–Withdrawals and Reservations: Temporary Withdrawals

The notation on public records on Apr. 6, 1973, of an application for withdrawal, even though the application did not contain a reference to authority for the withdrawal, as required in 43 CFR 2351.2(b) (1972), was sufficient to temporarily segregate the land under sections 2091.2-5 (1972) and 2351.3 (1972) from subsequent inclusion in a mining location.

5. Hearings–Mining Claims: Generally–Words and Phrases

"Contest." A decision declaring claims located on withdrawn lands to be null and void ab initio is not a "contest" and regulations under 43 CFR 4.451 et seq., relating to mining contests, have no application.

APPEARANCES: William B. Murray, Esq., Portland, Oregon, for appellants; Lawrence E. Cox, Esq., Assistant Regional Solicitor, Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GOSS

Delmer McLean and the other locators 1/ of the Elk Association Placer Claims Nos. 1 through 22 appeal from a decision of the Oregon State Office, Bureau of Land Management (BLM), declaring those claims

1/ Appellants are Delmer McLean, Jo McLean, Ronald C. McLean, Debra Ann McLean, James G. Robinson, Robin L. Robinson, Roger Prowell, and Susan Doris Prowell.

null and void ab initio for the following reasons:

(1) The Elk Association Placer Claims (see Appendix 1) are entirely situated on lands held to be segregated from mining location by BLM application for withdrawal OR-10676, posted on the records of the Oregon State Office, BLM on April 6, 1973.

(2) The claims, which were located January 31, 1978, also encompass lands (see Appendix 2) held to be further segregated from location by a BLM recreation and public purposes classification, OR-011364, filed November 13, 1956.

Appellants argue that (1) the application for withdrawal and the recreation and public purposes classification were void and ineffective to close the lands in question to mineral entry, (2) the decision appealed from is void for noncompliance with the Administrative Procedure Act, and (3) the decision appealed from is void for noncompliance with the Interior Department's regulations governing procedure for challenging the validity of mining claims.

[1, 2] Appellants argue initially that the "proposed" Recreational and Public Purposes (RPP) classification, which was filed November 13, 1956, and posted to the BLM plats on February 21, 1957, lapsed 18 months after it was filed when no application to utilize the lands was made. In support of this proposition appellants cite 43 U.S.C. § 869 (1970) which states:

Before the land may be disposed of under sections 869 to 869-4 of this title, it must be shown to the satisfaction of the Secretary that the land is to be used for an established or definitely proposed project. * * * Lands so classified may not be appropriated under any other public land law unless the Secretary revises such classification or authorizes the disposition of the interest in the lands under other applicable law. If within eighteen months following such classification, no application has been received for the purpose for which the lands have been so classified, the Secretary shall restore such lands to appropriation under the applicable public land laws. [Appellants' emphasis.]

Under 43 CFR 4.410 and 2400.0-4(a), the Board has no authority to order a change in land classification. The language of 43 U.S.C. § 869 is not self executing and, in the absence of action by the proper authority to restore the land, an RPP classification continues to remove the land from appropriation under the public land laws. R. C. Buch, 75 I.D. 140 (1968), sustained in Buch v. Morton, 449 F.2d 600, 607 (9th Cir. 1971). See also Elko County Board of Supervisors, 29 IBLA 220 (1977).

Appellants allege, further, that a BLM Instruction memo and various other BLM internal correspondence acted to vacate the RPP classification. The effect of these internal directives is described by the following passage from the Government's answer to appellants' Statement of Reasons:

We believe appellants refer to Instruction Memo 68-429 dated November 15, 1968 * * * rather than Instruction Memo No. 68-529 (Reasons p. 5) * * *. This memo did not direct immediate vacation of R&PP classifications but rather mandated review of such classification. Despite the direction the classification remained, and it continued to effect a segregation of the land from mineral location. The notation segregating this land for R&PP purposes was not removed from the public land records.

Appellants further argue that neither the RPP classification nor the proposed withdrawal became effective because they were never published in the Federal Register as required by 5 U.S.C. § 553.

While section 553(b) requires publication of certain matters, an exception appears in section 553(a)(2):

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved -

* * * * *

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts. [Emphasis added.]

As to "rules and regulations" promulgated after April 27, 1971, the statement of Department policy published in 36 FR 8336 (1971) provides for utilization of the public participation procedures of 5 U.S.C. § 553 (1976). Arizona Public Service Company, 20 IBLA 120, 122, fn. 1 (1975). The RPP classification, however, being prior to 1971, is not affected by the 1971 Departmental policy as to publication.

The 1973 proposed withdrawal was not such a "rule or regulation" that required prior publication under the 1971 Departmental policy. The Solicitor argues "rule making" involves prescription of law to effect broad policy considerations. Buckeye Power, Inc. v. EPA, 481 F.2d 162, 170 (6th Cir. 1973) (where approval of state pollution-abatement plans was rule making). "Rule making" is legislative in nature, primarily concerned with policy considerations for the future. American Express Co. v. United States, 472 F.2d 1050, 1055, (Ct. Cust. & Pat. App. 1973).

The withdrawal here was not a legislative rule under 5 U.S.C. § 553, supra. Rather, it was a specific act for a specific purpose. The Federal Land Policy and Management Act clearly distinguishes between withdrawals and regulations, and the procedure for promulgation. 43 U.S.C.A. §§ 1714, 1740 (West Supp. 1978). Prior to enactment of 43 U.S.C.A. § 1714 (Supp. 1978), it was clearly contemplated that the Federal lands could be preserved on an interim basis. 43 CFR 2351.3 (1972). Section 43 CFR 2353.1(b) (1972), which required publication in the Federal Register, applied only to withdrawal applications "finally approved."

Appellants raise two further arguments under Issue I. These are that there is no reason for the proposed withdrawal to include the lands within the claims and that the stone within the claims is an "uncommon variety."

As to whether the proposed withdrawal should have included the land embracing appellant's claims, such matters are not within the jurisdiction of the Board under 43 CFR 4.410. City of Kotzebue, 26 IBLA 264 (1976). Whether the stone is an uncommon variety would not become relevant unless the lands are subsequently opened to mining location. Both the proposed withdrawal and the RPP classification were effective to segregate the respective lands from entry under the mining laws at the time that appellants' claims were filed.

[3] Appellants argue that the decision appealed from is void for noncompliance with the procedures mandated by 5 U.S.C. §§ 554-556 (1970) in that the decision declared their claims null and void without affording claimants a proper notice and hearing. The viability of this argument is contingent upon appellants' secondary assertion that their claims constitute a property right which falls within the protective ambit of administrative due process requirements. We find that these claims, located on lands withdrawn from mineral location, were null and void from the very outset and never gave rise to any property right. In the Dredge Corporation, 65 I.D. 336 (1958), sustained, Dredge Corporation v. Penny, 362 F.2d 889 (9th Cir. 1966), the Solicitor stated at 338-39:

Almost from time immemorial the Department has observed a clear distinction between cases where the validity of a mining claim turns on the legal effect to be given to facts of record (a question of law) and cases where the validity of a claim depends upon the resolution of a factual issue (a question of fact). The second category of cases involves such issues as whether a discovery has been made or whether required expenditures for a patent have been made (in cases where claimants apply for a patent). Where there is a dispute on these latter issues, they can be resolved only upon the basis of such evidence such as the testimony of witnesses and pertinent documents like assay reports. Such evidence can properly be

received only at a hearing where witnesses are subject to cross-examination and observation as to demeanor. Consequently, in this category of cases, the Department has always ordered hearings to be held upon the basis of which a determination of the validity of the claims is made * * *.

Concurrently, however, while granting hearings in all cases involving factual issues, the department has determined the validity of claims where only legal issues were involved without holding hearings. * * * In all these cases, extending back 58 years, the Department held the claims involved to be invalid without holding a hearing. In fact, in *United States v. United States Borax Company*, 58 I.D. 426 (1944), the Department, in holding a claim to be void from its inception because located on land included in an oil and gas permit, said:

As the facts supporting these conclusions are established by the official records of the General Land Office, a contest proceeding (i.e., a hearing) is unnecessary. (P. 444.)

From this recital of departmental cases, it is obvious that the more recent cases declaring claims to be void upon the basis of facts of record, without holding a hearing, merely follow over a half century of precedent.

For the reasons set forth in Dredge Corporation, *supra*, we hold appellants were not legally entitled to notice or a hearing prior to the promulgation of the decision below.

[4] As to appellant's argument that the proposed withdrawal is void because the authority therefor is not recited in the application under 43 CFR 2351.2, 2/ it was not the completed withdrawal but rather the notation of the receipt of the application which had the segregative effect. Departmental regulation 43 CFR 2091.2-5 (1972), Withdrawal or reservation of Federal lands, provided in part:

(a) Application. The noting of the receipt of the application under §§ 2351.1 to 2351.6 in the tract books or on the official plats maintained in the proper office shall temporarily segregate such lands from settlement, location, sale, selection, entry, lease, and other forms

2/ Section 2351.2, filing of applications, provides in part:

"(b) No specific form of application is prescribed but it must contain the following information: * * *

"(11) Citation of the statutory or other authority for the type of withdrawal or reservation requested."

of disposal under the public land laws, including the mining and the mineral leasing laws, to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal.

See also 43 CFR 2351.3.

The failure to include in the application the authority for the proposed withdrawal is a curable defect, assuming that authority for the withdrawal does exist. The defect is minor when compared with the importance of protecting from subsequent adverse claims those public lands included in a withdrawal application. See United States v. Foresyth, 15 IBLA 43, 54-55 (1974).

[5] Appellants argue finally that the decision below should be set aside for noncompliance with Interior Department regulations relating to contests of mining claims. Citing 43 CFR 4.451 et seq., appellants contend that their claims could not properly be declared null and void without notice and a hearing. Regulation 43 CFR 4.451-1 et seq. is applicable only to Government "contests," and both the Department and the Federal courts have long allowed cancellation of mining claims filed on lands not open to mineral location without a "contest." (See, Dredge Corporation, supra.) The proceedings below were thus not a "contest" and regulations 43 CFR 4.451-1 et seq. have no application.

Accordingly, pursuant to the authority vested in the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Joseph W. Goss
Administrative Judge

We concur.

Edward W. Stuebing
Administrative Judge

Joan B. Thompson
Administrative Judge

APPENDIX I

List of Claims

Elk No. 1, OR MC 4938, located January 31, 1978
Received for recordation with BLM on February 15, 1978
Situating in T. 28 S., R. 32 E., W.M., Oregon, Sec. 22, NW 1/4
Recorded in Harney County, Oregon, on February 3, 1978,
Book L, Page 600 Instrument No. 172534

Elk No. 2, OR MC 4939, located January 31, 1978
Received for recordation with BLM on February 15, 1978
Situating in T. 28 S., R. 32 E., W.M., Oregon, Sec. 22,
W 1/2 NE 1/4 and SE 1/4 NE 1/4
Recorded in Harney County, Oregon, on February 3, 1978,
Book L, Page 601 Instrument No. 172535

Elk No. 3, OR MC 4940, located January 31, 1978
Received for recordation with BLM on February 15, 1978
Situating in T. 28 S., R. 32 E., W.M., Oregon, Sec. 22, SW 1/4
Recorded in Harney County, Oregon, on February 3, 1978,
Book L, Page 602 Instrument No. 172536

Elk No. 4, OR MC 4941, located January 31, 1978
Received for recordation with BLM on February 15, 1978
Situating in T. 28 S., R. 32 E., W.M., Oregon, Sec. 22, SE 1/4
Recorded in Harney County, Oregon, on February 3, 1978,
Book L, Page 603 Instrument No. 172537

Elk No. 5, OR MC 4942, located January 31, 1978
Received for recordation with BLM on February 15, 1978
Situating in T. 28 S., R. 32 E., W.M., Oregon, Sec. 23, SW 1/4
Recorded in Harney County, Oregon, on February 3, 1978,
Book L, Page 604 Instrument No. 172538

Elk No. 6, OR MC 4943, located January 31, 1978
Received for recordation with BLM on February 15, 1978
Situating in T. 28 S., R. 32 E., W.M., Oregon, Sec. 26, NW 1/4
Recorded in Harney County, Oregon, on February 3, 1978,
Book L, Page 605 Instrument No. 172539

Elk No. 7, OR MC 4944, located January 31, 1978
Received for recordation with BLM on February 15, 1978
Situating in T. 28 S., R. 32 E., W.M., Oregon, Sec. 27, NE 1/4
Recorded in Harney County, Oregon, on February 3, 1978,
Book L, Page 606 Instrument No. 172540

Elk No. 8, OR MC 4945, located January 31, 1978
Received for recordation with BLM on February 25, 1978
Situating in T. 28 S., R. 32 E., W.M., Oregon, Sec. 27, N 1/2 NW 1/4 Recorded in Harney County, Oregon, on February 3, 1978,

Book L, Page 607 Instrument No. 172541

Elk No. 9, OR MC 4946, located January 31, 1978
Received for recordation with BLM on February 15, 1978
Situating in T. 28 S., R. 32 E., W.M., Oregon, Sec. 35, NE 1/4
Recorded in Harney County, Oregon, on February 3, 1978,
Book L, Page 608 Instrument No. 172542

Elk No. 10, OR MC 4947, located January 31, 1978
Received for recordation with BLM on February 15, 1978
Situating in T. 28 S., R. 32 E., W.M., Oregon, Sec. 35, SE 1/4
Recorded in Harney County, Oregon, on February 3, 1978,
Book L, Page 609 Instrument No. 172543

Elk No. 11, OR MC 4948, located January 31, 1978
Received for recordation with BLM on February 15, 1978
Situating in T. 29 S., R. 32 E., W.M., Oregon, Sec. 2, NW 1/4
Recorded in Harney County, Oregon, on February 3, 1978,
Book L, Page 610 Instrument No. 172544

Elk No. 12, OR MC 4949, located January 31, 1978
Received for recordation with BLM on February 15, 1978
Situating in T. 29 S., R. 32 E., W.M., Oregon, Sec. 2, NE 1/4
Recorded in Harney County, Oregon, on February 3, 1978,
Book L, Page 611 Instrument No. 172545

Elk No. 13, OR MC 4950, located January 31, 1978
Received for recordation with BLM on February 15, 1978
Situating in T. 29 S., R. 32 E., W.M., Oregon, Sec. 2, SE 1/4
Recorded in Harney County, Oregon, on February 3, 1978,
Book L, Page 612 Instrument No. 172546

Elk No. 14, OR MC 4951, located January 31, 1978
Received for recordation with BLM on February 15, 1978
Situating in T. 29 S., R. 32 E., W.M., Oregon, Sec. 2, SW 1/4
Recorded in Harney County, Oregon, on February 3, 1978,
Book L, Page 613 Instrument No. 172547

Elk No. 15, OR MC 4952, located January 31, 1978
Received for recordation with BLM on February 15, 1978
Situating in T. 29 S., R. 32 E., W.M., Oregon, Sec. 1, SW 1/4
Recorded in Harney County, Oregon, on February 3, 1978,
Book L, Page 614 Instrument No. 172548

Elk No. 16, OR MC 4953, located January 31, 1978
 Received for recordation with BLM on February 15, 1978
 Situated in T. 29 S., R. 32 E., W.M., Oregon, Sec. 11, W 1/2 NE 1/4 and E 1/2 NW 1/4
 Recorded in Harney County, Oregon, on February 3, 1978,
 Book L, Page 615 Instrument No. 172549

Elk No. 17, OR MC 4954, located January 31, 1978
 Received for recordation with BLM on February 15, 1978
 Situated in T. 29 S., R. 32 E., W.M., Oregon, Sec. 10,
 E 1/2 NE 1/4 and Sec. 11, W 1/2 NW 1/4
 Recorded in Harney County, Oregon, on February 3, 1978,
 Book L, Page 616 Instrument No. 172550

Elk No. 18, OR MC 4955, located January 31, 1978
 Received for recordation with BLM on February 15, 1978
 Situated in T. 29 S., R. 32 E., W.M., Oregon, Sec. 3, SW 1/4
 Recorded in Harney County, Oregon, on February 3, 1978,
 Book L, Page 617 Instrument No. 172551

Elk No. 19, OR MC 4956, located January 31, 1978
 Received for recordation with BLM on February 15, 1978
 Situated in T. 29 S., R. 32 E., W.M., Oregon, Sec. 10,
 W 1/2 NE 1/4 and E 1/2 NW 1/4
 Recorded in Harney County, Oregon, on February 3, 1978,
 Book L, Page 618 Instrument No. 172552

Elk No. 20, OR MC 4957, located January 31, 1978
 Received for recordation with BLM on February 15, 1978
 Situated in T. 29 S., R. 32 E., W.M., Oregon, Sec. 9,
 E 1/2 NE 1/4 and Sec. 10, W 1/2 NW 1/4
 Recorded in Harney County, Oregon, February 3, 1978,
 Book L, Page 619 Instrument No. 172553

Elk No. 21, OR MC 4958, located January 31, 1978
 Received for recordation with BLM on February 15, 1978
 Situated in T. 29 S., R. 32 E., W.M., Oregon, Sec. 10,
 E 1/2 SW 1/4
 Recorded in Harney County, Oregon, on February 3, 1978,
 Book L, Page 620 Instrument No. 172554

Elk No. 22, OR MC 4959, located January 31, 1978
 Received for recordation with BLM on February 15, 1978
 Situated in T. 28 S., R. 32 E., W.M., Oregon, Sec. 26,
 W 1/2 SE 1/4 and E 1/2 SW 1/4
 Recorded in Harney County, Oregon, on February 3, 1978,
 Book L, Page 621 Instrument No. 172555

Appendix II

All of the Elk Association Placer Claims are situated on lands encompassed by BLM's Recreational and Public Purposes Classification, OR-011364 except for the following claims and portions of claims:

Elk No. 18, OR MC 4955: Section 3, SE 1/4 NE 1/4 SW 1/4, E 1/2
SW 1/4 NE 1/4 SW 1/4, and NE 1/4 SE 1/4
SW 1/4, T. 29 S., R. 32 E., W.M., Oregon

Elk No. 11, OR MC 4948: That portion situated in the NE 1/4 SE 1/4
NW 1/4, N 1/2 SE 1/4 SE 1/4 NW 1/4, S 1/2
SE 1/4 NE 1/4 NW 1/4, Section 2, T. 29 S.,
R. 32 E., W.M., Oregon

Elk No. 16, OR MC 4953: All

Elk No. 17, OR MC 4954: W 1/2 NW 1/4 Section 11, T. 29 S., R. 32 E., W.M., Oregon

